IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUSAN RONNING, Appellant, v. CANDACE MCCULLEY and JOHN DOE MCCULLEY, a marital community, Respondent.	)	No. 62136-0-I DIVISION ONE UNPUBLISHED OPINION FILED: June 8, 2009

Appelwick, J. — The trial court dismissed Ronning's tort claims, because substituted service of process on a person living on the same parcel of real estate, but in a different building, was not effective service, and the statute of limitations had expired. We affirm.

FACTS

On February 9, 2003, Candace McCulley and Susan Ronning were involved in an automobile accident. On January 31, 2008, Ronning filed a complaint for damages against McCulley alleging negligence and violations of sections of the rules of the road for motor vehicles, Chapter 46.61 RCW. This appeal arises from the trial court's grant

of summary judgment in favor of McCulley, because Ronning failed to effectuate proper service of process.

McCulley has resided at 10331 190th Street NE, in Arlington, Washington since January 2008. McCulley rents the house from Kevin Hammond. She is not married and lives in the home alone. Hammond and McCulley are not related.

The house where McCulley resides is situated on an eight acre lot, owned by Hammond. The property contains two structures: a 1,000 square foot main house where McCulley lives and a smaller structure where Hammond lives. The houses are approximately 400 feet apart. The smaller house, occupied by Hammond, has its own driveway, parking area, and garage. The two houses have separate electric meters. The houses share a septic system. The phone lines are separate. Hammond lived in the main house six years prior, but had not spent the night since McCulley took possession as a tenant.

Ronning and McCulley dispute the factual issues surrounding service of the summons and complaint. Beth Minard, from ABC Legal Messengers, attempted to serve the summons and complaint to McCulley at her home, on both February 22 and 27, 2008. Minard was unsuccessful on both days. On March 2, 2008, Minard again attempted to serve McCulley at her home. Minard found no one at home. She then spotted someone near a smaller structure. She believed this to be a separate property. Minard approached an unidentified man, and asked when the neighbors might be home. The person said, “Kevin is here.” Minard recalled that, after a minute or so, another man emerged from Hammond’s residence and walked in the direction of the

larger house. Minard yelled for him to stop, which he did. She identified herself and said she had legal papers for Candace McCulley. Minard then pointed toward the home where McCulley lived and asked the man if he lived there. He indicated that he did. Minard then asked if McCulley also lived there, which the man confirmed. Minard then handed the man the papers and asked him his identity. He replied, "Kevin Hammond."

McCulley offered the testimony of Hammond, who said he was inside his house when he heard someone outside. He walked outside to find a woman standing on his porch. Hammond asked, "[w]ho are you?" The woman responded, "[d]o you know Candy McCulley?" According to Hammond, the woman then handed him the papers. After receiving the summons and complaint from the process server, Hammond unlocked the door to McCulley's house with a key he owned and placed the papers on the table in the living room.

McCulley acknowledges that she received actual notice of the summons and complaint when she found the papers in her home.

McCulley filed a notice of appearance on March 7, 2008. It explicitly did not waive insufficiency of process. On March 31, 2008, McCulley's attorney sent a letter indicating that a settlement was possible. The record contains no further discussion of the letter or offer to settle. On May 23, 2008, McCulley filed her answer and affirmative defenses to plaintiff's complaint. The record contains no explanation or objection from Ronning about the three month delay between the notice of appearance and the filing of the answer. The answer denied the causes of action and asserted that Ronning

failed to properly serve McCulley. McCulley asserted that Ronning's claim was therefore barred by the statute of limitations.

On June 11, 2008, McCulley filed a motion for summary judgment, arguing that Ronning failed to satisfy the statutory requirements of RCW 4.28.080(15) for substituted service. The trial court granted McCulley's motion for summary judgment. Ronning appeals.

ANALYSIS

I. Substituted Service

Ronning claims the trial court erred in granting summary judgment, because service of process was sufficient. In a challenge to personal jurisdiction based on insufficient service of process, the challenging party has the burden of proof to establish a prima facie case of improper service. Woodruff v. Spence, 76 Wn. App. 207, 209–10, 883 P.2d 936 (1994). A plaintiff has the initial burden to produce an affidavit of service that on its face shows that service was properly carried out. Witt v. Port of Olympia, 126 Wn. App. 752, 757, 109 P.3d 489 (2005). If the plaintiff makes this showing, the burden then shifts to the defendant to prove by clear and convincing evidence that service was improper. Id.

Here, Ronning claims that McCulley was validly served pursuant to RCW 4.28.080(15), the statutory mandate for substituted service. Substitute service is effective when a copy of the summons is left at the defendant's house of usual abode, with a person of suitable age and discretion, who resides therein. RCW 4.28.080(15);

Sheldon v. Fettig, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996). We liberally construe the phrase "usual abode" and under certain circumstances, a defendant can have more than one house of usual abode. Id. at 609, 611. "A place of usual abode, however, must be 'a place where the defendant's domestic activity is centered and where service left with a family member is reasonably calculated to come to the defendant's attention within the statutory period for making an appearance.'" Blankenship v. Kaldor, 114 Wn. App. 312, 316, 57 P.3d 295 (2002) (quoting Gross v. Evert-Rosenberg, 85 Wn. App. 539, 542, 933 P.2d 439 (1997)). Whether a residence qualifies as a house of usual abode is a question of law that we review de novo. Blankenship, 114 Wn. App. at 316.

On two bases, Ronning fails to establish that service was properly effectuated under RCW 4.28.080(15). First, the record is undisputed that Hammond resides in the smaller structure, not with McCulley. RCW 4.28.080(15) requires a copy of the complaint be left "with some person of suitable age and discretion then resident therein." Second, Ronning did not serve the summons and complaint to McCulley's "usual abode". RCW 4.28.080(15). Instead, Minard, the process server, testified that she served Hammond at the smaller dwelling. On these facts, we hold that requirements of RCW 4.28.080(15) were not met.

But, Ronning argues that Hammond identified himself to Minard as a resident, thus the process server used due diligence in attempting to give proper notice. But, RCW 4.28.080(15) contains no exception to its requirements for a process server's due diligence. Instead, our inquiry under RCW 4.28.080(15) is not whether Minard perceived Hammond to reside with McCulley, but whether he actually resided there.

Blankenship, 114 Wn. App. at 316. Here, the record is undisputed that Hammond did not reside with McCulley.

Next, Ronning argues that because Hammond lives in a different structure on the same property, service was valid because he was a "resident" of the same parcel. As Ronning acknowledges, no Washington case has interpreted RCW 4.28.080(15) so broadly. Instead, courts refer to "abode" to mean a singular dwelling, not a parcel of land:

> Even those unlearned in the law would most likely conclude a house of usual abode is somebody's home, even if only on a seasonal basis, and then "resident therein" means a person who is actually living in that house at the time of the service of process.

Salts v. Estes, 133 Wn.2d 160, 164, 943 P.2d 275 (1997) (emphasis added). We hold that Washington law does not support reading RCW 4.28.080(15) so liberally as to construe "usual abode" as two dwellings on the same parcel. The facts are akin to an apartment complex where all of the units are situated on the same parcel. Service on a resident of an apartment other than the defendant's would surely not be adequate service. We see no difference in the context of a rural parcel with separate residences.

Ronning asserts that service was proper, because it was reasonably calculated to achieve proper service. Based on Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991), she argues that the purpose of RCW 4.28.080 is to effect actual notice. Then if actual notice is received, as it was here, then the due process intent of the statute has been met. In Wichert, the Washington Supreme Court held that service to the defendant's adult child who was an overnight guest, and sole occupant of defendant's residence at the time of service, was service to a "resident therein." Id. at

152. In doing so, it applied the principle outlined in Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950), which held that compliance with due process is achieved when "[t]he means employed [are] such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

But, Wichert marks the outer boundaries of RCW 4.28.080(15). Salts, 133 Wn.2d at 166. Instead, in Salts, the Washington Supreme Court held that substituted service was not effective if the summons and complaint were left with a house sitter at the defendant's home, explaining that "[p]recious little would be left of the term 'then resident therein' were we to determine substituted service can be obtained on a person who happens to be in the defendant's house only to feed the defendant's dog and check his mail." Id. Moreover, the court declined to interpret RCW 4.28.080(15) so that mere presence in the defendant's home or "possession" of the premises is sufficient to satisfy the statutory residency requirement. Id. at 169–70. Even though, here, the landlord had access and delivered the papers inside the McCulley residence, actual notice does not constitute sufficient service. Gerean v. Martin-Joven, 108 Wn. App. 963, 972, 33 P.3d 427 (2001).

To adopt Ronning's argument would be to ignore the underlying premise of Salts and the fundamental requirement that for proper service to be effectuated, the statutory mandate must be met. Here, Ronning served a neighbor, the landlord, who was a nonresident of McCulley's usual abode. We hold that this service was insufficient.

II. Waiver

Ronning claims that the trial court erred in granting the summary judgment motion, because McCulley waived the defense when she took actions inconsistent with its assertion

The defense of insufficient service of process is not waived if it is asserted in either a responsive pleading or a CR 12(b)(5) motion. CR 12(h)(1)(B); French v. Gabriel, 116 Wn.2d 584, 588, 806 P.2d 1234 (1991). Filing a notice of appearance does not waive the defense. CR 4(d)(5); Adkinson v. Digby, Inc., 99 Wn.2d 206, 210, 660 P.2d 756 (1983); Crouch v. Friedman, 51 Wn. App. 731, 735, 754 P.2d 1299 (1988). Delay in filing an answer does not waive the defense. French, 116 Wn.2d at 593–94.

Waiver of insufficient service as an affirmative defense can occur when the defendant's previous behavior is inconsistent with assertion of the defense or when counsel has been dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn.2d 29, 38–39, 1 P.3d 1124 (2000). Waiver requires "'the intentional abandonment or relinquishment of a known right [and i]t must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive.'" Clark v. Falling, 92 Wn. App. 805, 812–13, 965 P.2d 644 (1998) (quoting Mid-Town Ltd. P'ship v. Preston, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993)).

McCulley asserted that service was improper on March 7, 2008 in her notice of appearance, 5 days after she was served. McCulley also asserted the defense of insufficient service of process in her subsequent answer. But, Ronning claims that the

assertion of the defense was untimely, because the answer was not filed until May 2008. Ronning argues that waiver of the affirmative defense of insufficient service can also arise due to a defendant's behavior. "A defendant's conduct through his counsel . . . may be 'sufficiently dilatory or inconsistent with the later assertion of one of these [CR 8] defenses to justify declaring a waiver.'" Raymond v. Fleming, 24 Wn. App. 112, 115, 600 P.2d 614 (1979) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1344, at 526 (1969)). In Raymond, defense counsel repeatedly requested more time, received two continuances, and failed to respond to interrogatories before moving for dismissal for insufficient service. 24 Wn. App. at 114. These actions constituted a waiver of the defense. Id. at 115.

Similarly, in Lybbert, the defendant did not plead insufficient service, engaged in several months of discovery unrelated to a defense of insufficient service, discussed mediation, failed to respond to interrogatories inquiring about a possible insufficient service defense, and then asserted the defense after the statute of limitations had run. Lybbert, 141 Wn.2d at 42. Participation in these activities was found incompatible with an insufficient service defense and resulted in a waiver of the defense. Id.

In contrast, McCulley asserted insufficient service in her notice of appearance and again in her answer. The record indicates no reason for McCulley's late filing of the answer on May 23, 2008, nor does it indicate any objection by Ronning to the delay. The only evidence of any behavior inconsistent with the affirmative defense is the offer to settle. But, prior to a letter seeking more information and offering a potential settlement, McCulley filed her notice of appearance, which asserted the

defense. Despite the singular letter discussing a possible settlement if Ronning provided medical information, McCulley's actions notified Ronning of the defect in service and her intent to assert the defense. These actions are distinct from those in Lybbert. Even if McCulley delayed in filing the answer, the delay was not sufficient to constitute a waiver of the defense. See French, 116 Wn.2d at 593–94.

We hold that McCulley did not waive the defense of insufficiency of process.

We affirm.

WE CONCUR: